



Neutral Citation Number: [2015] EWHC 2295 (Admin)

Case No: CO/230/2014

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31/07/2015

Before :
THE HONOURABLE MRS JUSTICE MCGOWAN

Between :

Jon Kent	<u>Claimants</u>
-and-	
Christopher John Newman	
- and -	
Arun District Council	<u>Defendant</u>
-and-	
The owners/managers of Fontwell Racecourse	
Interested Party	
-and-	
Animal Protection Agency	
Intervener	

Gerard Clarke (instructed by **Warners Solicitors**) for the **Claimant**
Iain O'Donnell (instructed by **Arun District Council**) for the **Defendant**
Alan Bates (instructed by **Richard Buxton Solicitors**) for the **Intervener**

Hearing dates: 4 June 2015

APPROVED JUDGMENT

MRS JUSTICE McGOWAN :

1. The first and second Claimants are respectively the chairman of The Portsmouth Reptile and Amphibian Society, (“the Society”) an unincorporated association, and the Chairman of the Federation of British Herpetologists, (“the Federation”). The Society is an affiliated society of the Federation.
2. The Defendant is Arun District Council, (“the Council”), the local council for the area in which Fontwell Park Racecourse, (“FPR”), is situated.
3. The Interested Party is the owners and managers of FPR. They are the persons responsible for the day-to-day management of business at the racecourse.
4. It is part of the business of FPR to allow organisations to hold shows and events on its premises. The Society had arranged a Private Breeders’ Meeting to be held at the racecourse on 27 October 2013.
5. The Society has standing and brings this claim because they had organised and booked that meeting which was cancelled by the Interested Party; it is alleged acting on the orders of the Defendant.
6. It is said that the Federation has standing because the issue is the lawfulness of the sale of reptiles and amphibians at such meetings and, as the body for persons involved in the breeding and keeping of such animals they represent the interests of those persons.
7. The Animal Protection Agency, (“APA”), have been given leave to make representations as an Intervener, by an order of Dove J on 16 January 2015 they were allowed to make written submissions and oral submissions limited to 30 minutes at the hearing.

History

8. The meeting at the centre of this challenge had been booked to take place at the racecourse on 27 October 2013. It was cancelled in the weeks before that date.
9. The Society did not apply to the Council for a licence under the **Pet Animals Act 1951**, which provides;

1.-(1) No person shall keep a pet shop except under the authority of a licence granted in accordance with the provisions of this Act.

(2) Every local authority may, on application being made to them for that purpose by a person who is not for the time being disqualified from keeping a pet shop, and on payment of such fee as may be determined by the local authority, grant a licence to that person to keep a pet shop at such premises in their area as may be specified in the application and subject to compliance with such conditions as may be specified in the licence.

(3) In determining whether to grant a licence for the keeping of a pet shop by any person at any premises, a local authority shall in particular (but without prejudice to their discretion to withhold a licence on other grounds) have regard to the need for securing-

(a) –(e) welfare provisions

2. If any person carries on a business of selling animals as pets in any part of a street or public place, except at a stall or barrow in a market, he shall be guilty of an offence.

7.--(1) References in this Act to the keeping of a pet shop shall, subject to the following provisions of this section, be construed as references to the carrying on at premises of any nature (including a private dwelling) of a business of selling animals as pets, and as including references to the keeping of animals in any such premises as aforesaid with a view to their being sold in the course of such a business, whether by the keeper thereof or by any other person:

Provided that-

(a) a person shall not be deemed to keep a pet shop by reason only of his keeping or selling pedigree animals bred by him, or the offspring of an animal kept by him as a pet;

(b) where a person carries on a business of selling animals as pets in conjunction with a business of breeding pedigree animals, and the local authority are satisfied that the animals so sold by him (in so far as they are not pedigree animals bred by him) are animals which were acquired by him with a view to being used, if suitable, for breeding or show purposes but have subsequently been found by him not to be suitable or required for such use, the local authority may if they think fit direct that the said person shall not be deemed to keep a pet shop by reason only of his carrying on the first-mentioned business.

(2) References in this Act to the selling or keeping of animals as pets shall be construed in accordance with the following provisions, that is to say-

(a) as respects cats and dogs, such references shall be construed as including references to selling or keeping, as the case may be, wholly or mainly for domestic purposes; and

(b) as respects any animal, such references shall be construed as including references to selling or keeping, as the case may be, for ornamental purposes.

(3) In this Act, unless the context otherwise requires, the following expressions have the meanings hereby respectively assigned to them, that is to say:-

“animal” includes any description of vertebrate;

“premises” includes any stall or barrow in a market, but save as aforesaid does not include any stall or barrow or any part of a street or public place;

10. On 21 October 2013 the Defendant wrote to the Society setting out their concerns about the proposed meeting,

“It is the view of the Council that there is a substantial risk of unlawful activity taking place at the scheduled event. This is taking into account a detailed interpretation of the legislation (as outlined above) in relation to the selling of live animals. Therefore we have had to make the decision to advise the Management team at the racecourse to cancel the event. The decision has been conveyed to the Managers at Fontwell Racecourse and they are in agreement with our decision.”

11. The sale of animals is unlawful if carried out in the “course of a business”, ss. 2 and 7(1) Pet Animals Act 1951.

12. The view of the Council as to the risk of unlawful activity was informed by an email from Elaine Toland of the APA, dated 16 October 2013. She set out her concerns about the impermissible sale of animals at other similar events. Elaine Toland has provided a good deal of evidence setting out her views that sales outside the permitted categories were taking place at previous similar shows. It is clear that many of the same stallholders appear at these shows throughout the year. A selection of advertising material, photographs and video clips has been compiled. A review of the material clearly demonstrates that the impermissible sale of animals may well have been taking place at these shows.
13. There does not need to be absolute proof of such conduct. The Council has a duty to receive, consider and react to the provision of such evidence. It argues that it is entitled to act in anticipation of possible unlawful activity.
14. The Council was bound to act on the basis of the material provided. They were alerted to the possibility of unlawful activity. They investigated that proposition and were perfectly entitled to conclude that there was a “substantial risk of unlawful activity taking place at the scheduled event”.
15. Having reached that conclusion, the Council was duty bound to notify the FPR’s management. Kirstie Leighton, of its Legal Services Department, wrote to the Operations Manager at FPR on 21 October 2013. She set out the relevant statutory provisions and stated the Council’s determination that there should not be any breach of the law.

“Councils are responsible for enforcing the law in this area and action will be taken with regard to the forthcoming event so that the Council does not permit any unlawful activity taking place.”

At an absolute minimum we must insist that the event organisers and the participants that absolutely no sales of animals can take place at the event. However the event may proceed as an animal exhibition with the sale of dry goods and reptilian/amphibian paraphernalia.” (sic)

16. The Terms and Conditions of the agreement between the Society and FPR set out provisions for the cancellation of such an event at clause 26, which states,

“Fontwell Park Racecourse reserves the right to cancel a function at any time after confirmation in Fontwell Park Racecourse are of the opinion that holding the function would prejudice the reputation of the venue.”

17. The event was cancelled by FRC through John Fulbrook, their Operations Manager, who contacted Lynn Kent. She was the contact that FPR had at the event organisers. She is the wife of the 1st Claimant.
18. The real point of contention in this claim arises from the formulation of the letter from the Council to the event organisers notifying them of the cancellation of the event. On 21 October Kirstie Leighton also wrote to Mrs. Kent. Her letter again set out the

statutory provisions, stated the Council's duty to enforce the law and went on to the following paragraphs:

"It is the view of the Council that there is a substantial risk of unlawful activity taking place at the scheduled event this is taking into account a detailed interpretation of the legislation (as outlined above) in relation to the selling of live animals. Therefore we have had to make a decision to advise the Management team at the racecourse to cancel the event. This decision has been conveyed to the Managers at Fontwell Racecourse and they are in agreement with our decision."

The Claim

19. The claim was brought on 17 January 2014 seeking a quashing order following judicial review of "Arun District Council's decision to cancel a breeders' meeting scheduled to take place at Fontwell Racecourse on 27 October 2013". The claim was argued on the following submissions,
 - a. That the council had no power to prohibit or procure the cancellation of the event,
 - b. Whether or not criminal offences are committed at such an event is a matter for a criminal court to determine and the Council has no pre-emptive powers and
 - c. The Council was wrong to form the view that offences might have been committed.
20. It is said in the Claimant's skeleton argument at paragraph 30, "In any event, even if the Council did not make a decision that is susceptible to judicial review, its position on this matter, which is a position also adopted by other local authorities, involves an error of law and the Court is asked to grant appropriate declaratory relief for the guidance of local authorities and others concerned in the holding of meetings at which animals may be sold."
21. The Defendant's position is that the Council were entitled to view the evidence of the conduct of other shows as demonstrating the substantial risk of offences occurring at this show. That it properly warned FPR of that risk and that the decision taken by FPR was made independently of the Council.
22. In any event the Defendant argues that judicial review is not the proper remedy, if there is a need for a remedy here it lies in private law against FPR.

Discussion

23. The first question is whether the Council, if alerted to the risk of unlawful activity, should investigate the matter and pass on its concerns to an organisation such as FPR? The answer must be in the affirmative. The Council is a public body; it has a duty to do what it properly can to prevent the commission of offences by legitimate means. Warning an organisation such as the racecourse that its premises might be hosting an event at which unlawful activity might take place is an entirely proper course to have taken.

24. Secondly, was the council right to fear such unlawful activity? There is much material and arguments have been advanced as to how it should be interpreted. It is not for this court to decide that there was unlawful activity at earlier events. It is rather to determine whether the Council acted reasonably and properly in fearing that there was a substantial risk that such activity might occur. On the material available that was a reasonable conclusion to have reached; in any event it was not arguably so unreasonable as to be the proper subject of review.
25. Thirdly, did the Council “procure” the cancellation of the event? The letter written to the organisers of the event by the Council on 21 October might have been more clearly worded but it does not bear the interpretation that the Claimants urge. It amounts to this, that the Council had taken a decision to advise and the recipients of that advice are in agreement with it. The clear sense of that is that the recipients might not have been in agreement. Most significantly is the uncontradicted evidence of Simon Williams, the Executive Director of FPR, in his witness statement of 6 August 2014. He says in terms at paragraph 8,
- “Staff at Fontwell Park Racecourse took the decision on behalf of the racecourse to cancel the event after taking into account advice from the Council.”*
- If that decision was wrong then the Claimants were entitled to bring a private law action against the FPR.
26. There is no arguable basis upon which this claim, even if properly brought, could succeed. Permission is refused.

The Intervener’s Position

27. The APA seeks to invite the court to determine the **“Interpretation Issue”**. It argues that in order to determine the claim the court should interpret s. 2 Pet Animals Act 1951. It seeks clarification of the statute so that enforcement, by criminal sanction, would be more obviously and readily available.
28. The legislative history is long and detailed and need not be rehearsed here. The question of who can sell pet animals and in what circumstances is on the Parliamentary agenda, although it is clear it regularly loses its place on the list of priorities. Notwithstanding the understandable desire of the Intervener and others interested in the subject for clarity, it is not for this court to legislate or to determine in advance of a course of conduct what would or would not amount to the commission of a criminal offence. There are exceptional circumstances in which such a course might be appropriate; this is not one such.
29. This court is guided by the authority of R (on the app of Haynes) v Stafford Borough Council [2006] EWHC 1366 (Admin) in which Walker J, set out the following propositions,

12. *The Criminal Liability Question*

13. *.....On analysis, as it seems to me, there was no disagreement among the parties on the accuracy of certain propositions which can be identified from these discussions and the cases cited. I do not attempt, by*

identifying these propositions, to set out a code of general application. The propositions are simply those which may have relevance to the present case.

14. The first proposition is that the High Court has jurisdiction to make a declaration as to whether a criminal offence has been committed or may be committed in the future, but it is only to be exercised in exceptional circumstances. As explained by Simon Brown LJ in *R v DPP ex p Camelot Group plc* (1997) 10 Admin L Rep 93 at 104, the decision falls to be taken not as one of high principle but rather in the light of a number of considerations. The court should adopt an essentially flexible approach to the exercise of its declaratory jurisdiction in this field. The only rigid rule is that once criminal proceedings have begun the civil courts should not intervene. That said, other things being equal, criminal disputes, even upon pure issues of law, are best decided in criminal courts and between the parties most directly affected by their outcome.

15. The second proposition is that the extent to which a case is fact sensitive or not is a factor of great importance, and consistently with this a question of pure law may more readily be made the subject matter of a declaration: see Lord Steyn in *R (Rusbridger) v Attorney General* [2004] 1 AC 357 at para 23 and conclusion 3(iv) of Simon Brown LJ in *Camelot*.

16. The third proposition is that it will be relevant to consider the extent to which there is a cogent public or individual interest which could be advanced by the grant of a declaration. This proposition was put forward by the Attorney General in *Rusbridger* and was implicitly accepted by Lord Steyn at para 24. To my mind it is a proposition which will be generally applicable to any discretionary grant of a declaration.

17. The fourth proposition is that while recognising the advantages of the application of the law being clear in relation to future conduct, it would only be proper to grant a declaration if it is clearly established that there is no risk of it treating conduct as criminal which is not clearly in contravention of the criminal law (see Woolf J in *Attorney General v Able* [1984] QB 795 at 807G, 808A-B).

18. The fifth proposition is that there may be a distinction between declarations that certain conduct is criminal as opposed to those that certain conduct is not criminal. If a court declares what conduct will be criminal, it may be performing exactly the task which the jury would have to perform at a criminal trial. However, if the court rules that the conduct is not criminal, it is performing a similar function to the judge at a criminal trial who stops the case on a submission of no case to answer. (See Woolf J in *Able*, [1984] QB at 807 to 808.)

19. The sixth proposition is that the courts should be particularly wary of embarking on this jurisdiction otherwise than at the suit of the Attorney General: see conclusion 3(i) of Simon Brown LJ in *Camelot*.

20. The seventh proposition is that the courts should be particularly cautious where a proposed declaration involves existing conduct, rather than merely prospective future conduct: see conclusion 3(ii) of Simon Brown LJ in *Camelot*.

21. The eighth proposition is that the availability of an alternative remedy is always relevant, and it may be a decisive factor. The court should consider the advantages and disadvantages of the respective remedies: see conclusion 4 of Simon Brown LJ in *Camelot*.

30. The need for greater clarification is made out but it is not for this court to determine some act to be criminal which may not currently be in breach of the criminal law. Nor

to determine what future conduct might amount to the commission of a criminal offence.

31. That the Intervener's argument can be dealt with shortly does not reflect upon its importance to the parties in this case and to similar organisations and local authorities. It may be that efforts to persuade Parliament to revisit this topic can be renewed.
32. For the reasons above the court does not provide an interpretation of s.2 of the Pet Animals Act 1951.